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No. 85-2149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIE WARREN CRAFT and LOUIS A. DeSALLE III,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, TRUMAN O. ANDERSON, HOWARD BERS, ELIZABETH McGREW and JACK BULMASH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED *

1. Whether petitioners, having received an adverse jury verdict on their claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, may now challenge their entitlement to a jury trial on those claims, when: (a) those claims were submitted to the jury at petitioners' insistence and over respondents' objection; and (b) petitioners did not seek reversal in the court of appeals based on this alleged error.

2. Whether the court of appeals properly held that a violation of Section 2000d itself requires proof of intentional discrimination, and, whether, in any event, petitioners may complain of a jury instruction to that effect when the very instruction they now challenge was tendered by petitioners themselves.

* Petitioners are two individuals. Respondent the Board of Trustees of the University of Illinois is a body corporate and politic organized by the State of Illinois to manage the affairs of the University of Illinois. *See Ill. Rev. Stat.*, ch. 144, § 22 (1985). The additional respondents are individuals employed by the Board of Trustees as faculty members or administrators of the University's College of Medicine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 793 F.2d 140.

STATEMENT OF THE CASE

1. District Court Proceedings

Petitioners are two black men who were dismissed for academic reasons from the Doctor of Medicine degree program at the University of Illinois College of Medicine after repeated failures on the Senior Comprehensive Examination; successful completion of this examination (which is scored by computer) has been required of every M.D. degree student at the College of Medicine since the adoption of the examination in 1963 (Tr. 1072). The trial evidence showed that Mr. Craft failed the examination four times; that Mr. DeSalle failed the examination five times; and that no student ever had been given more chances than Mr. DeSalle to pass the exam (Tr. 796, 906-07, 1043-44, 1323). The trial evidence also showed that, in addition to being given numerous additional chances to take this and other examinations, petitioners were afforded extensive remedial learning opportunities throughout the periods of their enrollment, but that they frequently spurned the help that was made available to them (D. Br. 20-26 (C.A. 7)).[1] Finally, the trial evidence showed

[1] For example, during Mr. DeSalle's first year, Dean Kernis attempted to assist him after he had experienced several academic failures, but Mr. DeSalle took the position that those academic failures were "not a problem" (Tr. 695-97). Similarly, after Mr. DeSalle had failed National Boards, Part I for the first time, the College of Medicine Promotions Committee recommended that he postpone his clinical work, take an additional year of study, and receive counselling on study habits and test-taking skills (Tr. 708-09). Mr. DeSalle rejected that recommendation out-of-hand, choosing instead to take and fail National Boards, Part I for the second time (Tr. 442-47, 704-709). In preparing for his fifth attempt on the Senior Comprehensive Examination, Mr. DeSalle refused

(Footnote continued on following page)

that between 1969 and 1981, the University of Illinois graduated more black medical doctors than any other medical college in the United States, with the exception of Howard University and Meharry Medical College, two historically black institutions (Tr. 1129; DX 159).

Petitioners sued the Board of Trustees and certain individual faculty members and administrators, seeking either the immediate conferral of M.D. degrees or readmission to the College of Medicine, as well as money damages in the amount of $10.3 million. In their amended complaint, which was tried to a racially-mixed jury for 13 trial days in April and May 1984, petitioners alleged violations of 42 U.S.C. §§ 1981, 1983, 1985(3) and 2000e, 31 U.S.C. §§ 6716 and 6721, common law contract duties, and the

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[1] *continued*
the University's offer to provide him with a faculty advisor or tutor, and even refused to comply with the University's request that he prepare a written study plan for faculty comment and assistance (Tr. 1493, 1503).

Mr. Craft's record is much the same. For example, after Mr. Craft failed the Senior Comprehensive Examination for the second time, he refused Dr. McGrew's offer to assist him in preparing for his third attempt (Tr. 1474, 1493). Similarly, after he failed the Senior Comprehensive Examination for the third time, a remedial program was specifically designed for him, but he refused to follow it and refused to meet with Dr. Bulmash, his advisor, who found him "resistant" to his efforts at helping him (Tr. 935, 1243, 1294).

For petitioners to contend now (Pet. 3) that the University refused to provide them with a remedial program is both disingenuous and flatly contrary to the trial evidence, which demonstrated the University's herculean efforts to provide remedial assistance to petitioners, who simply did not wish to take advantage of it. Petitioners' out-of-context quotation (Pet. 4) of a remark made by defense counsel during closing arguments cannot alter that fact. As the context shows (Tr. 1751), counsel merely stated that there were some black students (including an honors graduate called as a witness by petitioners) who did succeed in medical school without remedial assistance.

equal protection and due process clauses of the Fourteenth Amendment.

After the close of the evidence, the trial court, over respondents' objections, granted petitioners' motion for leave to amend their complaint again, this time to allege a violation of 42 U.S.C. § 2000d (Tr. 1584-86). During the instructions conference, petitioners also requested that their new Section 2000d claims be submitted to the jury (Tr. 1700-01). Petitioners specifically argued (1) that Section 2000d authorizes the granting of both damages and equitable relief, and (2) that the jury should be permitted to decide their entitlement to both forms of relief (Tr. 1584-85, 1632-36, 1700-01). For their part, respondents consistently opposed petitioners' request that their Section 2000d claims be submitted to the jury (Tr. 1584-85, 1700). Respondents argued that only equitable relief is available under Section 2000d, and that the awarding of equitable relief is a matter for the trial judge, not the jury (*id.*). At petitioners' urging, however, the trial judge eventually agreed to instruct the jury that defendants could be liable for damages under Section 2000d (Tr. 1639). The trial judge also stated that he would be guided by the jury verdict, and would award equitable relief to petitioners if the jury found in their favor on the Section 2000d claims (Tr. 1701).

With respect to petitioners' Section 2000d "damages" claims, the trial judge gave verbatim the instruction which petitioners had drafted and tendered to the court (Tr. 1798-99). The instruction provided that petitioners must show "knowing or intentional discrimination" to establish a violation of Section 2000d (*id.*).

Petitioners never moved for leave to amend their complaint to allege a violation of any administrative regula-

tion promulgated under Section 2000d. Nor did petitioners tender any jury instruction concerning an alleged violation of any such regulation. Indeed, at no time during any of the proceedings in the trial court did petitioners even mention any such regulation.

The jury subsequently returned a verdict against both petitioners and in favor of all respondents on every claim (Tr. 1837-39). When the trial judge entered judgment on the jury's verdict, he specifically stated that he would have reached the same result if he had sat as the trier of fact (Tr. 1843). Petitioners subsequently presented a post-trial motion for declaratory and injunctive relief and for a new trial. Petitioners did not request oral argument on the motion, declined the court's invitation to file a supporting memorandum, and filed no reply to respondents' answer. The trial judge denied petitioners' post-trial motion on June 28, 1984. In denying the post-trial motion, the trial judge stated that petitioners' case was so weak that "Clarence Darrow resurrected could [not] have gotten any relief in this case" (Pet. App. 6a n.2).

2. Seventh Circuit Proceedings

On appeal, petitioners argued that the judgment should be reversed for two reasons. First, petitioners argued that the trial judge should not have given the jury the Section 2000d instruction which they themselves had tendered because petitioners' instruction stated that proof of discriminatory intent was an element of their Section 2000d claims. Second, petitioners argued that the trial judge erred in failing to enter separate findings of fact and conclusions of law with respect to their claim for equitable relief, despite the fact that they never asked him to do so, and, further, despite the fact that the jury had determined that respondents had not violated Section 2000d.

The court of appeals affirmed. First, the court of appeals held (Pet. App. 4a) that the Section 2000d instruction given to the jury was a correct statement of the law, because, as this Court reaffirmed in its unanimous decision in *Alexander v. Choate*, 105 S. Ct. 712, 717 (1985), Section 2000d itself "reache[s] only instances of intentional discrimination."[2] Second, without intimating any opinion as to whether the district court should have acceded to petitioners' request that their Section 2000d claims be submitted to the jury (that issue not having been raised on appeal), the court of appeals held that the trial judge, having submitted the Section 2000d claims to the jury, was bound by the jury's finding that respondents had not violated Section 2000d (Pet. App. 5a).

[2] The court of appeals recognized (Pet. App. 4a-5a) that a party properly may seek limited and prospective equitable relief, notwithstanding his failure to prove intentional discrimination, if he bases his entitlement to relief on purported violations of certain regulations promulgated under Section 2000d. As the court of appeals pointed out, however, that principle is irrelevant in this case because "[t]he disparate impact theory was not fairly presented to the [district] judge as a basis for awarding equitable relief. . . . [and the] regulations [were] never mentioned before the district court" (*id.*).

REASONS FOR DENYING THE WRIT

Petitioners ask that this Court grant review in this case for the purpose of holding that they were not entitled to the jury trial which they persuaded the trial court to grant them over respondents' objections, and for the additional purpose of holding that the Section 2000d jury instruction which was given by the trial judge at petitioners' specific request is not an accurate statement of the law. In addition, they ask that this Court clarify the scope of relief available for violations of regulations promulgated under Title VI, as well as the standards of proof applicable to cases involving such violations—despite the fact that petitioners never mentioned, let alone invoked, any such regulations at any time during the district court proceedings in this case.

Petitioners have deliberately concealed from this Court the central fact that they themselves induced the district court, over respondents' strong objections, to commit the "errors" about which they now complain. Similarly, petitioners have deliberately concealed from this Court the fact that the issues they now seek to raise were not raised below and are not supported by the record. In sum, the petition in this case is frivolous and should be denied.

I. THE SEVENTH CIRCUIT DID NOT REACH THE QUESTION WHETHER A JURY TRIAL IS AVAILABLE FOR TITLE VI VIOLATIONS AND DID NOT THEREFORE CREATE ANY CONFLICT IN THE CIRCUITS.

Petitioners assert (Pet. 7) that this case warrants review by this Court because the Seventh Circuit "held" that petitioners' Section 2000d claims properly were submitted

to the jury, a "holding" which allegedly conflicts with the Fifth Circuit's decision in *Doe v. Region 13 Mental Health Commission*, 704 F.2d 1402 (5th Cir. 1983). In fact, the Seventh Circuit's opinion contains no such holding, either at the page which petitioners cite (Pet. App. 5a) or anywhere else. The fact is that the Seventh Circuit took this case as it found it. The Section 2000d claims had been submitted to the jury because petitioners had insisted that they be submitted to the jury, and the trial judge, over respondents' strenuous objections, acceded to petitioners' request (Tr. 1585-86, 1632-39, 1700-01).

On appeal, respondents obviously had no reason to attack the jury verdict, and petitioners, having induced the error themselves, quite properly recognized then (if not now) that they had no standing to complain. Thus, the question of petitioners' entitlement to a jury trial on their Section 2000d claims simply was not presented to the Seventh Circuit. In that court, petitioners presented only two issues for review, neither of which concerned the propriety of submitting their Section 2000d claims to the jury: (1) whether proof of discriminatory intent is an essential element of a Section 2000d claim, and (2) whether the trial judge erred in failing to enter separate findings of fact with respect to petitioners' claim for equitable relief (Pet. App. 3a). In resolving these questions, the Seventh Circuit held only that the jury instruction tendered by petitioners constituted a correct statement of the law, that is, that proof of intentional discrimination is necessary to prevail on a claim under Title VI itself. *See Alexander v. Choate*, 105 S. Ct. 712, 717 (1985). In approving that legal standard, however, the Seventh Circuit neither had any occasion to discuss, nor did it in fact discuss, the ques-

tion whether that legal standard ordinarily should be applied by the judge, rather than by the jury.[3]

In sum, the Seventh Circuit did not hold that Title VI plaintiffs are entitled to a jury trial. All that the Seventh Circuit did in this case was to follow the well-established practice of deciding only those issues which the parties present to it for decision. *See, e.g., Preston v. United States*, 709 F.2d 488, 489 (7th Cir. 1983). For these reasons, petitioners' assertion of a conflict among the circuits on this point is wholly disingenuous.

II. THE SEVENTH CIRCUIT'S HOLDING THAT INTENT IS AN ELEMENT OF A SECTION 2000d CLAIM IS CORRECT AND DOES NOT CONFLICT WITH ANY PRIOR HOLDING OF THIS OR ANY OTHER COURT.

Relying on this Court's decision in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), the Seventh Circuit held (Pet. App. 4a) that discriminatory intent is an essential element of a claim for compensatory relief under Title VI itself. Petitioners do not assert that this holding conflicts in any way with any other decision of this or any other court, and, in fact, no such conflict exists. Despite the absence of any conflict, petitioners suggest (Pet. 7) that this Court should grant review in this case for the purpose of "clarifying" its opinion in *Guardians*.

Since there is no conflict on this point, the absence of any need for "clarification" is manifest. Moreover, as the Seventh Circuit recognized (Pet. App. 4a), this Court has recently explained its holding in *Guardians*. In *Alexander*

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[3] As the Seventh Circuit pointed out (Pet. App. 6a n.2), the issue would have been entirely academic in any event because the trial judge specifically stated that he would have reached the same result if he had been sitting as the trier of fact.

v. Choate, 105 S. Ct. 712, 716 (1985), this Court revisited the question "whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate impact discrimination." In *Alexander*, Justice Marshall, writing for a unanimous Court, reaffirmed the Court's holding in *Guardians*, stating: "[T]he Court [in *Guardians*] held that Title VI itself directly reache[s] only instances of intentional discrimination" (*id.* at 717). In sum, it is difficult to imagine how this Court could give any further clarity to this rule of law.[4]

Petitioners' suggestion that the Court grant review to "clarify" this issue is absurd for at least two further reasons. First, the statement of the law which petitioners now contend to be erroneous was contained in a jury instruction which they themselves prepared and tendered to the trial court (Tr. 1798-99). Thus, they have no standing to raise the issue. Second, the specific "clarification" they seek is wholly irrelevant to this case. Petitioners seek "clarification" (Pet. 6) concerning the standard of proof required to establish a violation of administrative regulations promulgated under Title VI. However, that issue is entirely irrelevant to the case at bar because peti-

[4] Petitioners make a half-hearted attempt to distinguish *Guardians* by asserting (Pet. 5) that the breach of a general condition not to discriminate, which was at issue in *Guardians*, is somehow "different" from respondents' alleged breach of a promise to provide remedial programs. In addition to founding their distinction upon a factual premise which is entirely contrary to the trial evidence (*see* pages 2-3 & note 1, *supra*), petitioners fail to explain why any legal significance should be attributed to this alleged factual difference. Finally, as with virtually all of petitioners' arguments in this Court, this argument is one that was not made in either court below.

tioners never sought any relief whatever in the district court based on any alleged violation of any such regulation (Pet. App. 5a). Indeed, no such regulation was even mentioned by petitioners during the trial. Nor was any such regulation mentioned in petitioners' post-trial motion. This issue is entirely the figment of appellate counsel's imagination. There is nothing in the record to support raising it here.

III. THE QUESTIONS WHICH PETITIONERS CLAIM TO WARRANT REVIEW BY THIS COURT ARE NOT REVIEWABLE IN ANY EVENT BECAUSE THEY CONCERN ERRORS INDUCED BY PETITIONERS OR ARE MATTERS THAT WERE NO PART OF THE TRIAL OF THIS CASE.

Nowhere is petitioners' lack of candor more obvious than in their total failure to acknowledge that the "errors" upon which they now seek review are errors which they themselves induced the district court to make. Petitioners repeatedly implored the district court to submit their Section 2000d claims to the jury, and the trial judge did so over respondents' equally repeated objections (Tr. 1585-86, 1632-36, 1700-02). In addition, petitioners themselves drafted and tendered to the trial judge the very jury instruction that they now maintain erroneously stated the law (Tr. 1798-99). Finally, petitioners never alleged any violation of any Title VI regulation at any time during the district court proceedings in this case, and petitioners never advanced a disparate impact theory at trial. As the court of appeals correctly observed (Pet. App. 4a), "[t]his case proceeded from start to finish on a theory of intentional discrimination."

The short answer to the petition in this case is that this Court does not sit to review issues manufactured by appellate counsel; nor does this Court sit to resolve disputes

between trial and appellate counsel as to how petitioners' case should have been handled in the trial court. Thus, the fundamental question presented in this case is neither of the questions presented by petitioners, but the question whether a party may seek review in this Court based on issues not presented below and on errors which the party himself induced the trial court to make. Upon that question, there is no conflict among the circuits. Petitioners' inability to seek review based on errors which they themselves induced is a matter of hornbook law, as the Seventh Circuit correctly held below (Pet. App. 4a-5a). *See, e.g., International Travelers Cheque Co. v. Bank America Corp.*, 660 F.2d 215, 224 (7th Cir. 1981) ("[a] party cannot complain of errors which it has committed, invited, induced the Court to make, or to which it has consented"). Similarly, petitioners' inability to raise issues for the first time in this Court is well-established. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). *See also Oneida County v. Oneida Indian Nation*, 105 S. Ct. 1245, 1257 (1985); *Delta Airlines v. August*, 450 U.S. 346, 362 (1980); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1976); *Usery v. Turner Elkorn Mining Co.*, 428 U.S. 1, 37 (1976); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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